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DEPT. OF TRANSPORTATION
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BEFORE THE UNITED STATES
DEPARTMENT OF TRANSPORTATION
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Re: 49 CFR Part 573 et al.
Reporting of Information and Documents
About Potential Defects Retention of
Records That Could Indicate Defects

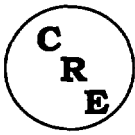
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) Docket No. NHTSA-2001-8677; Notice 2 -510
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COMMENTS OF:

The Center for Regulatory Effectiveness

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August 26, 2002



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August 26, 2002

Docket Management
Room PL-401
400 Seventh Street, S.W.
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SUBJECT: Comments on the Proposed Collection of Information
Docket No. NHTSA-2001-8677; Notice 2
49 CFR Part 573 et al.
Reporting of Information and Documents
About Potential Defects Retention of
Records That Could Indicate Defects

The Center for Regulatory Effectiveness (CRE) is submitting the following comments to the Department of Transportation (DOT) and the Office of Management and Budget (OMB) on the Department's proposed collection of information in the above captioned proceeding.

Concerns Regarding the Proposed Collection of Information

CRE is concerned that:

1. Some of the data requested lacks practical utility to all parties, including NHTSA;
2. None of the data requested would have practical utility parties outside NHTSA; and
3. Routine release of Early Warning data would lead to "Regulation by Litigation," in violation of Executive Order 12988.

Some Early Warning Data Lacks Practical Utility to NHTSA

Claims-related information NHTSA is proposing to collect would lack practical utility. The lack of practical utility stems from two problems:

1. NHTSA's definition of "claim" is so broad as to include completely unverified and unsubstantiated information; and
2. NHTSA's definition of "minimal specificity" for reported information is insufficient to allow NHTSA to verify even the most basic facts about the claim, such as brand name of the product in question.

With respect to NHTSA's definition of claims, the agency has defined the terms to mean:

A demand in the absence of a lawsuit, a complaint initiating a lawsuit, an assertion or notice of litigation, a settlement, covenant not to sue or release of liability in the absence of a written demand, and a subrogation request.

Thus, NHTSA is proposing to collect completely unsubstantiated and unverified claims for which there is absolutely no indication as truthfulness or accuracy. OMB should not allow NHTSA to collect such data since such unverified assertions can have no practical utility for assessing automotive safety. Furthermore, since such data includes confidential information, such as settlements, such data must not be released to the public.

With respect to the "minimal specificity" issue, NHTSA's reporting requirements would be insufficient to provide the agency with the information necessary to verify that even the most basic information, such as the name of the manufacturer, was accurately reported. This issue is of particular concern with regard to tires since the "minimum specificity" requirements for property damage claims do not include the Tire Identification Number (TIN). This identification number is essential in order for NHTSA to know whether the tire brand, line and size information was accurately reported.

The minimum specificity issue is of less concern for vehicle manufacturers since most consumers are likely to accurately know the brand of car/truck they drive than the brand of tire on the vehicle. Consumers may well mistakenly report the tire brands they are most familiar with rather than the actual make of tire on their vehicle. The mistaken reporting could be a particularly serious issue if the tires in question carry a less-known brand name. If NHTSA is not able to verify the accuracy of the reported information, the agency could well miss important trends, thus potentially compromising public safety.

The need for enhanced specificity is particularly important with regard to property damage claims given volume of this information relative to deaths and personal injury claims. Therefore, in order for tire-related claims information to even potentially have practical utility, a minimal requirement is that the tire identification number information be reported.

With regard to all claims information, it is important to highlight that the utility provisions of the Federal Data Quality Act (P.L. 106-554, sec. 515) would prohibit dissemination of all unverified information to the public.

All Early Warning Data Lacks Practical Utility to Outside Parties

Some of the data NHTSA intends to collect under the Early Warning rule may have practical utility to the agency. However, even data which does have utility to the agency would not have utility to the general public and disclosure of such information should not be allowed under the Paperwork Reduction Act.

The Paperwork Reduction Act Governs Potential Release of Early Warning Data to the Public

The PRA states that agencies are to describe and provide for public comment, among other factors, the “proposed use of the information” and that OMB is to review the agency statement as well as associated public comment. Sec. 3507(a)(1)(D)(ii)(IV). The Act also states that, “Before approving a proposed collection of information, the Director shall determine whether...the information shall have practical utility.” Sec. 3508.

NHTSA has stated in the Early Warning final rule that they intend to provide “appropriate information” to the public through ARTEMIS (Advanced Retrieval Tire, Equipment, Motor vehicles Information System). 67 FR 45865

NHTSA has also stated that the Early Warning rule does not, “establish rules governing disclosure or confidentiality of information submitted pursuant to the early warning rule.” 67 FR 45866, footnote 6. Instead, NHTSA has established a Confidential Business Information (CBI) rulemaking to establish such disclosure rules. However, since the CBI rulemaking concerns information that would be collected under the subject proposed information collection, this is the appropriate opportunity for OMB to address, under the Paperwork Reduction Act (PRA), use and dissemination of the Early Warning data.

Since release of at least some Early Warning data is clearly a “use” of the data contemplated by NHTSA, the use is subject to the PRA.

Evaluation of Early Warning Data Requires Specialized Knowledge and Analytic Tools

NHTSA has stated that they will analyze Early Warning data, in part, through “statistical control mechanisms” and “data analysis tools.” Furthermore, NHTSA will evaluate the data in light of “other information available to NHTSA” and, as necessary, “supplemental information requested from a manufacturer.” The public lacks the data analysis tools, overall context and NHTSA’s specialized expertise in analyzing automotive safety data. Thus, the data that has practical utility to NHTSA would not have such utility to the public and should not be routinely released to the public, including through Freedom Of Information Act requests.

In that the Early Warning data NHTSA proposes to collect could potentially have practical utility only for the Agency, OMB should authorize such collection only on the grounds that it not be routinely released

Routine Release of Early Warning data Would Lead to "Regulation by Litigation," Violating Executive Order 12988.

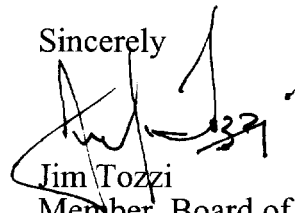
Executive Order 12988 "Civil Justice Reform" instructs agencies, in accordance with the mechanisms and procedures established in Executive Order 12866 and OMB Circular A-19, to write regulations so as to "minimize litigation." Sec. 3(a)(2) NHTSA's stated intention to release at least some of the Early Warning information would likely lead to a substantial increase in litigation as trial lawyers attempt to capitalize on unverified, out of context and partial information. Some of the litigation would likely have the goal of monetary reward. Other litigation, however, may well be aimed at achieving through the court system, *de facto* changes in regulation which could not be achieved through the public process. This phenomena is known as "Regulation by Litigation."

Regulations that would result in substantial additional litigation, regardless of whether the new litigation is aimed at monetary gain or changing public policy, are barred under Executive Order 12988.

RECOMMENDATIONS

1. OMB's paperwork clearance, if granted, should explicitly prohibit the collection of claims, particularly property damage claims data, without requiring that the agency also collect the data needed to verify basic information.
2. OMB's paperwork clearance, if granted, should explicitly prohibit NHTSA from routinely releasing Early Warning data to the public, including in response to FOIA requests.

Sincerely

A handwritten signature in black ink, appearing to read "Jim Tozzi", with a stylized flourish at the end.

Jim Tozzi
Member, Board of Advisors